TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~238~~ 90

THE NORWICH AND NEW YORK TRANSPORTATION COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN FLINT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED NOVEMBER 12, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 288.

THE NORWICH AND NEW YORK TRANSPORTATION COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN FLINT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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1 UNITED STATES OF AMERICA, *ss:*

To John Flint, of Boston, in the district of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit, and district of Connecticut, wherein the Norwich & New York Transportation Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not
2 be done to the parties in that behalf.

Witness the Honorable William D. Shipman, one of the judges of the circuit court of the United States, at Hartford, in the district of Connecticut, this 23d day of September, A. D. 1870, and of the independence of the United States the ninety-fourth.

WILLIAM D. SHIPMAN, *Judge.*

UNITED STATES OF AMERICA,
District of Connecticut, ss:

NEW HAVEN, *Sept. 30th*, 1870.

Then and there I left in the hands of Simeon E. Baldwin, who is attorney for John Flint, the within defendant in error, a true and attested copy of this writ of citation, describing said Baldwin in my attestation of said copy as attorney for said Flint; said Baldwin admitting to me that he was attorney for said Flint.

Attest:

P. R. CARLL,
U. S. Marshal for the District of Connecticut.

2½ UNITED STATES OF AMERICA,
District of Connecticut, City of Norwich, ss:

On this 10th day of October, A. D. 1870, before me personally came Julius Webb, of said city of Norwich, and made solemn oath that on the 8th day of October, A. D. 1870, he placed a true and attested copy of the foregoing citation in the hands of John Flint, the defendant in error therein named, at his place of residence in the city of Boston, in the State of Massachusetts.

JULIUS WEBB.

Subscribed and sworn to at the city of Norwich, on the 10th day of October, A. D. 1870, before me.

JAMES A. HOVEY,
U. S. Commissioner.

(Indorsed:) Citation. The Norwich & New York Transportation Co., pl'ff in error, vs. John Flint, def't in error.

Filed Sept. 23d, 1870.

Attest: LOREN P. WALDO, *Clerk*,
per M.

3 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America, to the judges of the circuit court for the second circuit, and district of Connecticut, greeting;

Because in the record and proceedings, as also in the rendition of a

judgment in a plea which is in the said circuit court before you, between John Flint, of Boston, in the district of Massachusetts, and The Norwich & New York Transportation Company, a corporation duly and legally incorporated under the laws of the State of Connecticut, and having its office and principal place of business at Norwich, in said State, a manifest error hath happened, to the great damage of
4 the said Norwich & New York Transportation Company, as by their complaint appears; and, it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
5 therein, to correct that error, what of right, according to the law and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Hartford, in the district of Connecticut, this 23d day of September, A. D. 1870, and of the independence of the United States the ninety-fourth.

LOREN P. WALDO,
Clerk of the U. S. Circuit Court for the District of Connecticut.

(Indorsed:) Writ of error. The Norwich & New York Transportation Co., pl'ff in error, vs. John Flint, def't in error.
Filed with copy Sept. 23d, 1870.

Copy lodged and sent to Baldwin, def't's att'y, Sept. 26, 1870.
Attest: LOREN P. WALDO, *Clerk.*
per M.

6 The answer of Samuel Nelson, chief judge of the circuit court of the United States for the second circuit, and district of Connecticut to the foregoing writ:

The record and process whereof mention is therein made follow in these words, to wit:

UNITED STATES OF AMERICA,
District of Connecticut ss:

At a circuit court of the United States appointed to be held, and held, at New Haven on the fourth Tuesday of April, A. D. 1868:
Present, Honorable William D. Shipman, judge.

JOHN FLINT
vs.
THE NORWICH & NEW YORK TRANSPORTATION Company.

7 Be it remembered that the Norwich and New York Transportation Company, a corporation duly incorporated under the laws of the State of Connecticut, organized and doing business therein, and having an office and place of business at the town of Norwich, was at

tached and summoned to appear before the honorable circuit court of the United States of America, of the second circuit, next to be holden at the town of Hartford, in said State and district of Connecticut, on the third Tuesday of September, anno Domini one thousand eight hundred and sixty-six, then and there to answer unto John Flint, physician, of the city of Boston, in the State of Massachusetts, a citizen of the United States, in a plea of the case, whereupon the plaintiff declares and says:

That heretofore, to wit, on the sixth day of June, anno Domini
8 one thousand eight hundred and sixty-four, and on the day of the commission of the grievance hereinafter mentioned, and long before said day, the defendants were, and still are, common carriers of freight and passengers for hire, between the city of New York, in the State of New York, and the city of New London, in the State of Connecticut; and used and possessed, for the prosecution of said carrying business, a line of steamboats, running daily between said cities during all the time aforesaid, and were accustomed to run said boats in connection with divers railroads running northerly from said New London, to wit, with the Norwich and Worcester Railroad Company, connecting with the Boston and Worcester Railroad Company, and with the New London Northern Railroad Company, and to receive freight and passengers for said city of New York from said railroads, and to land freight and passengers for said railroads coming on their boats from New York; and had, moreover, entered into such arrangements and contracts with said railroad companies, that at a certain convenient place in said city of Boston, to wit, at a ticket-office of said Boston and Worcester Railroad Company, tickets were placed on sale, entitling the purchaser to a
passage by rail from said Boston to said New London, and thence
9 by boat, upon the defendants' line, from said New London to said New York.

And the plaintiff, on said sixth day of June, in said year, bought at said ticket-office in Boston, from the agent in charge, paying therefor the sum demanded by said agent to said agent, a coupon ticket, one coupon entitling him to a passage by rail to the city of Worcester, and another to a like passage thence to said New London, and the third coupon entitling him to a passage on one of the defendants' steamboats, thence to New York; and, thereupon, and on said day, the plaintiff got on board of a train of cars running from Boston to Worcester, and thence proceeded by rail to New London, all by virtue of said purchased ticket; and the plaintiff also purchased on said day, of said agent, and brought with him to New London, the evidence of a right to the use of a berth in a state-room on said steamboat, paying therefor an additional and reasonable compensation to said agent. And, on arriving at said New London, the plaintiff thereupon immediately went on board a steamboat of the defendants, which was then lying there ready to receive the railway passengers bound for New York, and became a passenger thereon, to be conveyed to New York upon said boat, in
10 safety, in consideration of said purchase of said coupon ticket and of moneys paid to the defendants by him therefor, to their full satisfaction, and at their request. And when the plaintiff had thus gone on board of said boat to become a passenger thereon to New York, on said day, he went at once, in company with many other passengers, and in conformity to the usage of passengers upon the defendants' line of boats, to the office of the captain of said boat, in order there to exhibit and deposit his ticket, and have his name recorded, and get the key to his state-room. Now, before the plaintiff stepped on board said

boat, a company of soldiers, in the service of the United States, had gone on board the same, under the command of a non-commissioned officer, all of them armed with muskets, and said officer with a loaded musket, but the plaintiff did not then know that the same was loaded, and these soldiers had taken their station on the deck of said boat, for the purpose of being carried thereon to New York, and had been put in and permitted to remain in such a place, on said deck, by the officers of the said boat in the employ of the defendants; that it was neces-
11 sary to pass near to or through them in order to go from the deck to the captain's office, and thence to the passenger saloon on said boat, and in this place said soldiers remained during all the time after the plaintiff got on board said boat on said day, until the discharge of the gun hereinafter described, and for the space of half an hour. And during all this time said soldiers were conducting themselves in a noisy, quarrelsome, boisterous, and offensive manner, to the great annoyance of all the passengers who were entering the boat and visiting the captain's office; and many of said soldiers were intoxicated with strong drink, and were wrangling and scuffling with each other, being armed, as aforesaid. Now, when the plaintiff went, as aforesaid, to the captain's office, he was obliged, as well as the other passengers, to pass near to these soldiers, and upon the conclusion of his business there, he received his state-room key, and proceeded, in the usual manner of the defendant's passengers, and in the exercise of due care, and without negligence, up toward the passenger saloon, still being obliged to pass near to said soldiers on his way to the saloon; but, just then, their wrangling increased in violence, and several of said soldiers had
12 a severe scuffle with each other, and the officer in command of them, in the course of which scuffle said officer's musket was violently thrown upon the deck, and thereby discharged, and the contents thereof took effect in the left foot and ankle and leg of the plaintiff, who was near said soldiers when the musket fell, and lacerated and mangled his limb in a terrible manner, so that he was obliged to be carried to his state-room, and on the arrival of the boat in New York, to be carried to the house of another, where he was confined to his bed for about four months, and was so reduced in strength, and so seriously injured by said wounds, that his life was in jeopardy, and was obliged to submit, under the advice of the most eminent surgeons, to an amputation of his leg above the ankle.

Now, the plaintiff says that, upon his entrance on board said boat as a passenger for hire as aforesaid, it then became and was the duty of the defendants to use the utmost diligence and caution to carry him safely to New York which a prudent man could use; but that the defendants, disregarding their duty, did not use due diligence and caution in that behalf, but that their agents in charge of his transporta-
13 tion, and the officers of their said boat, wholly neglected to use proper care for the safety of himself and the other passengers; but, on the contrary, negligently permitted said soldiers (being quarrelsome, intoxicated, boisterous, and with arms in their hands, loaded with powder and ball) to stand upon said deck, in said place, for half an hour, to the great danger of every passenger approaching or leaving the captain's office; and took no means to quiet said soldiers, and quell their disturbances and scuffles, or to remove their loaded muskets from them, or to put them in some place in the boat where other passengers could not be so much annoyed and endangered by their presence, of which places the plaintiff avers that there were several upon said boat, where said soldiers could at any time have been placed. And, by reason

of said negligence and unskillfulness of the defendants and their agents, the plaintiff was exposed to danger of being shot as aforesaid, and was, in fact, shot by one of said muskets borne by said soldiers, whereby he suffered said injuries, and was so confined to his bed in a strange city for four months, and has become a cripple for life by the neces-
14 sary amputation of his leg, and laid out necessarily great sums of money for nursing, care, board, and medical attendance, and surgical operations and advice, and transportation, to wit, the sum of five thousand dollars, ($5,000;) and lost during said four months his profits, which he would otherwise have derived from his profession as a practicing physician in Boston, to wit, the further sum of three thousand dollars, ($3,000;) and has also been rendered less able, by reason of the amputation of his limb, to endure the fatigues and fulfill the duties of his profession since his return to Boston, and for the whole of his life; and has suffered, and does still suffer, great pain, inconvenience, and anguish from the consequences of said injury so received by the defendants' negligence; all of which is to his damage in the sum of fifty thousand ($50,000) dollars, to recover which sum and costs this suit is brought.

2d count. And the plaintiff further declares and says that the defendants, on the first day of January, A. D. 1864, and on the day of the discharge of the gun hereinafter mentioned, and ever since, to the present time, have been common carriers of freight and passen-
15 gers between the cities of New London, in the State of Connecticut, and New York, in the State of New York, and owned, used, and possessed a line of steamboats for use in said business, one of which they run upon every secular day of the week from said New London to New York; and that heretofore, to wit, on the sixth day of June, A. D. 1864, the plaintiff, at the request of the defendants, at said New London, became and was a passenger upon one of their said steamboats, other than that mentioned in the preceding count of this declaration, for New York from New London, for a certain reward by him duly before that time paid to the defendants; and did also engage the use of a state-room berth to sleep in and use during the said trip for a further reward paid to them previously by him for that end.

And thereupon it became and was the duty of the defendants to safely convey him to New York with all due care and diligence, yet the defendants, not regarding this their duty, neglected to use due care and diligence in the premises, to carry him safely from said New London to New York; but on the contrary, permitted a company of soldiers, many of whom were at the time intoxicated, noisy, and quarrelsome,
16 and insubordinate, in charge only of a non-commissioned officer, and all armed with loaded muskets, who were also passengers on said boat from New London to New York, to occupy a part of the deck of said boat, on and near which it was customary and expected that all passengers, having state-rooms engaged, should pass, in going to and returning from the captain's office, to procure the key of their several state-rooms. And further, the defendants, though well knowing, through the knowledge of their agents, the officers of said boat, that said soldiers, while in said place, were an annoyance and nuisance, and dangerous to the other passengers, by reason of their condition and wrangling, and pushing, and insubordination, and that there were other places on board where they might be placed, with reasonable convenience to themselves and all on board, and that they were drunken, boisterous, and armed as aforesaid, did not attempt to remove said soldiers or any of them to a better place, where they would be less likely to harm the

rest nor to remove them from the boat entirely, nor to quiet them, and terminate their wrangling, nor to disarm them; but, on the
17 contrary, negligently and with gross carelessness, permitted them to remain as they were for the space of half an hour after the entrance of the plaintiff on the boat, and until the injury inflicted upon him hereinafter described. And the plaintiff says that, on entering said boat, he proceeded, according to the custom of the line, to the captain's office thereon, to show his ticket, record his name, and get his state-room key, and having done all this, went on, in the exercise of r'asonable care, and without negligence, to ascend the stairway from the lower deck to the upper one, where his state-room was situated, according to the custom of the defendants' line of boats, and of the passengers thereon having state-rooms; but that then a violent disturbance ensued, without his fault, among said soldiers, accompanied with loud cries, threatenings to shoot, and pushing each other, and some of the other passengers to and fro, over that part of the deck between the captain's office and the stairways, then being so customarily used by the passengers, and that said soldiers so continued fighting in the presence of the officers of the boat, employed therefor by the defendants, and in charge of the same, for a long time, to wit, twenty minutes;
18 and that in the midst of said disturbance, a loaded musket was thrown from the hands of one of said soldiers, as he was scuffling with others of his comrades, upon the deck, and was thereby discharged, and the ball, with which the same was loaded, was lodged in the ankle of the plaintiff, as he was ascending said stairway to his state-room, as aforesaid, and severely fractured the bones of the ankle and leg, and tore and mangled the surrounding flesh, in consequence of which he was made very sick and weak, and put in great anguish, and his life greatly endangered; and, on the arrival of the boat in New York, had to be carried to the house of another person, where he was confined to his bed many, to wit, four months, and was further obliged to submit, under the advice of skillful surgeons, to an amputation of the wounded limb between the ankle and knee. And the plaintiff was put to great expense for board, nursing, transportation, and medical and surgical attendance, to wit, the sum of five thousand dollars, and suffered a loss of time and of business as a practising physician, during his said
19 confinement, involving a loss of business to the value of three thousand dollars, and has been permanently disabled and crippled, and rendered less able to sustain the fatigues and duties, and reap the emoluments of his profession as a physician, all of which damage the plaintiff avers was sustained by reason of the negligence of the defendants, their servants and agents, and might have been avoided by due care on their part, and the total amount of said damages, so suffered and accruing to the plaintiff, are to the amount of fifty thousand dollars, to recover which sum and costs the plaintiff brings this suit.

And at the present term of this court, holden at New Haven, on the fourth Tuesday of April, A. D. 1868, to which time the defendants had leave to impl'ad to the declaration aforesaid, come as well the said plaintiff, by Simeon E. Baldwin, esq., his attorney, as the said defendants, by Messrs. Halsey & Beach, their attorneys; and now the said defendants in court to the said declaration plead as follows: "Defendants in court defend, plead, and say, that they are not guilty in manner and form as in the said declaration is alleged, and thereof put themselves on the jury for trial."

20 By their attorneys,

HALSEY & BEACH.

To which the plaintiff joined issue as follows:
"And the plaintiff doth the like."

By SIMEON E. BALDWIN,
His Attorney.

Therefore the marshal of said district of Connecticut is commanded that he cause to come here immediately, twelve, &c., by whom, &c., and who, &c., to recognize, &c., because as well, &c., and the jurors of said jury, by the marshal for this purpose empannelled and returned, to wit: Edward Flemming, William B. Starkie, Caleb S. Beebe, Lucius Talmage, William N. Harrison, William E. Cone, Clement Bushnell, Charles F. Robinson, Smith Beach, Edward Treadwell, Harry Notchkiss, Joel Osborn, being called, come; who, being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oaths say that in this case the jury find the issue for the plaintiff; therefore find for the plaintiff to recover of the defendants the sum of ten thousand dollars, together with his costs.

Which said verdict of the jury was accepted by the court and ordered on file.

Whereupon the defendants filed in court a motion for new trial, which was settled and allowed, with leave to turn the same into a bill of exceptions on the final determination thereof.

21 And thereafter, at the term of the circuit court of the United States held at Hartford, within and for the second circuit and district of Connecticut, on the third Tuesday, to wit, the 20th day of September, A. D. 1870, the parties in the above-entitled cause having been fully heard on said motion for a new trial, the court doth adjudge, order, and decree that said motion be denied;

Whereupon it is considered by the court, here, this 20th day of September, A. D. 1870, that the plaintiff do recover of the defendants the sum of dollars damages, and their costs taxed and allowed, at the sum of dollars, and have execution therefor; and thereupon the defendants filed in court the following bill of exceptions, to wit:

22 United States circuit court, district of Connecticut, April term, 1868.

JOHN FLINT
vs.
THE NORWICH AND NEW YORK TRANSPORTATION COMPANY. } Bill of exceptions.

Be it remembered that, on the trial of this cause to the jury upon the plea of general issue, as on file, it was admitted that the defendants were common carriers between New London and New York, by steamboat, and that on the 6th day of June, A. D. 1864, the plaintiff left his home in Boston for New York; that before leaving he purchased a through ticket, by which he was entitled to a passage from Boston to Worcester, on the Boston and Worcester Railroad from Worcester to New London, over the Norwich and Worcester Railroad to Norwich, and the New London Northern Railroad to New London, and from New London to New York, through the sound, by one of the defendants' passenger boats; and that he passed safely over the route from Bos-

23 ton to New London, where he arrived about eleven o'clock in the evening, and proceeded on board the defendants' steamer, the

City of Boston, which was then lying at the dock, with steam up, ready to proceed on her trip to New York.

The plaintiff offered evidence tending to prove that when he came upon the after deck of said steamer, in the usual place for passengers to enter, there were a number of soldiers in the service of the United States on said after deck, some of whom were armed with loaded and capped muskets; that some of them were "crazy drunk;" that they were noisy and quarrelsome, using profane and indecent language, and pushing each other and the passengers about the deck, and that one of them with arms, in particular, struck the hat of a civilian passenger down over his eyes, by a severe blow, given without provocation; that said soldiers remained upon said part of the deck in substantially the same condition for about half an hour, and that finally, in a struggle between some of them, one of said muskets was thrown down upon the deck and discharged, and the ball, with which it was loaded, passed through the plaintiff's foot, injuring him severely. The defend-
24 ants offered evidence tending to prove that, on said 6th day of June, an order was issued by the officer in command at Fort Trumbull, in pursuance of general orders from the Adjutant General's Office in Washington, that all the disposable recruits and assigned men fit for duty belonging to the 14th infantry, United States Army, properly rationed and equipped for field duty, should leave the post that evening for New York, to join their regiment in the fifth army corps, Army of the Potomac, in the field, and directed the quartermaster of the post to furnish necessary transportation for that purpose; and that in pursuance of said order, a detachment of said 14th infantry, consisting of sixty-three enlisted men, among whom were a sergeant and two corporals, accompanied by two lieutenants in said regiment, left said post under the command of said officers, and with the regimental band, marched to the defendants' wharf, and on board their said boat, and were stationed on the forward part of the deck, by their officers, about half past nine to ten o'clock, on the evening of said day; that of said detachment, eighteen men in all, were detailed by their officers as
25 a guard, and the said guard were armed *were armed* with muskets, loaded and capped, and furnished with bayonets, and that the remainder of the detachment were unarmed; that after said detachment had been marched upon said deck, sentinels were selected from said guard and were stationed to confine the detachment to the forward deck of said boat, and to prevent their going on shore; that soon after the passengers from said train came on board, one of the unarmed recruits from Fort Trumbull undertook to pass the sentinel on the port side of the engine-room, and was repulsed; that he repeated the attempt and again failed, and that he finally returned with several of his comrades, and overpowered the sentinel, when they rushed aft near to or into the space where the passengers came on board; that some of said guard followed, when a struggle ensued near the saloon stairs between the insubordinate recruits and the pursuing guards, and that in the struggle to arrest these men, a musket was snatched by one of them from the hands of one the guards, and was thrown violently upon the deck and discharged, by which the plaintiff was shot.

26 For the purpose of proving the condition of affairs on said deck, the extent and character of the disturbance, and the condition and situation of the officers and soldiers on board, and the manner in which they discharged their duty prior to and at the time when the plaintiff received his injury, and as evidence of the length of time between the beginning of the disturbance and the firing of the shot, and

for the purpose of showing a failure on the part of the officers of said soldiers to keep them in proper order and repress disorder amongst them, (it being admitted that there were no persons on board directly charged with the care of preserving order and repressing disorder among said soldiers, other than their officers,) the plaintiff offered in evidence the testimony of George Renton, John L. Sullivan, and Helen Sullivan, his wife, who were passengers on said boat, who testified that after they had gone down to the dining-saloon, and were at the table, a man in military uniform, whom they supposed, from the stripes upon his arm, to be a sergeant, came into the saloon and saluted an officer in uniform, whom they supposed to be a lieutenant, and who was sitting at the table with another officer, whom from his uniform, they sup-
27 posed to belong to the Navy, and said to him: "There is a row on deck, and I cannot suppress it;" that the officer who was addressed replied: "Mind your orders;" that the person, supposed to be a sergeant, said: "I am afraid some one will be hurt;" that the officer replied: "You have your orders; mind your orders;" that the person supposed to be a sergeant, then retired, and that after a few minutes, he came down again into the saloon hurriedly, and very soon after the report of a gun had been heard by one of said witnesses, and addressing the same officer, said: "For God's sake, come up; a man has been shot."

To the admission of this evidence, for all the purposes for which it was offered, the defendant objected, and particularly for the purpose of showing the condition of affairs upon the deck of said boat, just prior to and at the time the plaintiff received his injury; but the court overruled the objection, and admitted the evidence.

And the defendant here in court, and during the trial of said cause, excepts to the judgment and opinion of said court in ad-
28 mitting said evidence.

And inasmuch as the foregoing facts, and the rulings and judgment of said court, do not appear of record, the defendants prays that this bill of exceptions may be certified and signed by the judge of said court, that the same may become a part and parcel of the record in said cause.

By the court allowed, and ordered to be lodged on file.

L. B. WOODRUFF.
Circuit Judge.

Whereupon the defendants, within the time allowed by law, prayed out a writ of error from said court to the Supreme Court of the United States, and filed the same, with a certified copy thereof, and their sufficient bond, with surety duly approved by the judge of this court, in the office of the clerk thereof; and said bond, whereof mention is made, was in the words and figures following, to wit:

29 Supreme Court of the United States.

JOHN FLINT
vs.
THE NORWICH & NEW YORK TRANSPORTATION Company. } In error.

Know all men by these presents that the aforesaid Norwich and New York Transportation Company, a corporation duly established by the

laws of the State of Connecticut, and David Smith, and Julius Webb, of Norwich, in the county of New London, and State of Connecticut, are held and firmly bound unto the above-named John Flint, in the sum of fifteen thousand dollars, to be paid to the said John Flint, or his executors and administrators, to which payment well and truly to be made, we, the said Norwich and New York Transportation Company, binds itself and its successors, and the said David Smith and Julius Webb, respectively, their heirs, executors, and administrators, firmly by these presents.

In witness whereof the said Norwich & New York Transportation Company has caused these presents to be signed and sealed by Alba F. Smith, president of said company, duly authorized, and the
30 said David Smith and Julius Webb have hereunto set their hands and seals this 22d day of September, in the year of our Lord one thousand eight hundred and seventy.

Whereas, the above-named Norwich and New York Transportation Company have presented a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled cause by the United States circuit court for the second circuit, within and for the district of Connecticut:

Now, therefore, the condition of this obligation is such, that if the above-named Norwich & New York Transportation Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

The Norwich & New York Transportation Company,
{ SEAL OF N. & N. Y. T. CO. }
By A. F. SMITH, *President.*
DAVID SMITH. [SEAL.]
JULIUS WEBB. [SEAL.]

Witness:
H. L. PARKER.
Witness as to signature J. W.:
C. C. JOHNSON.

Taken and acknowledged this 26th day of September, A. D. 1870, at Norwich, in the district of Connecticut, before me.

JAMES A. HOVEY,
U. S. Commissioner.

31 UNITED STATES OF AMERICA,
District of Connecticut, ss:

On this 27th day of September, A. D. 1870, at the City of Norwich, in said district, personally appeared the above-named David Smith and Julius Webb, and made oath that they respectively are worth the sum of fifteen thousand dollars, after the payment of their just debts.

DAVID SMITH.
JULIUS WEBB.

Subscribed and sworn to before me.

JAMES A. HOVEY,
U. S. Commissioner.

Approved.

W'M D. SHIPMAN,
Dist. Judge.

Wherefore said writ is allowed to the Supreme Court of the United States.

Attest:

LOREN P. WALDO, *Clerk.*

32 I, Loren P. Waldo, clerk of the circuit court of the United States for the district of Connecticut, within the second circuit, do certify that the foregoing is a true copy of the record in cause of John Flint against the Norwich and New York Transportation Company, in this court.

In testimony whereof I have set hereunto my name officially, and the seal of said circuit court at Hartford, in said district, this 1st day of October, A. D. 1870.

Attest:

LOREN P. WALDO, *Clerk.*

(Indorsement on cover:) No. 288. The Norwich & New York Transportation Company, plaintiff in error, vs. John Flint. Connecticut C. C. U. S. Filed 12th November, 1870.

UNITED STATES

SUPREME COURT.

No. 288.

THE NORWICH & NEW YORK TRANSPORTATION CO.,

Plaintiffs in Error.

VS.

JOHN FLINT.

ABSTRACT AND POINTS

FOR THE PLAINTIFFS IN ERROR.

JEREMIAH HALSEY,

Counsel for Plaintiffs in Error.

NORWICH:

PRINTED BY THE NORWICH PRINTING CO.

1871.

UNITED STATES
SUPREME COURT.

No. 288.

THE NORWICH & NEW YORK TRANSPORTATION CO.,

Plaintiffs in Error.

VS.

JOHN FLINT.

ABSTRACT AND POINTS
FOR THE PLAINTIFFS IN ERROR.

JEREMIAH HALSEY,

Counsel for Plaintiff's in Error.

The plaintiff herein, on the 6th day of June, 1864, at Boston, purchased passage tickets which entitled him to passage by railroads to New London and thence to New York, on a steamboat run by the defendants as common carriers of passengers and freight. He arrived at New London at about eleven o'clock in the evening, and with other passengers was received on board.

For an injury received while on board the defendant's steamer, (the City of Boston,) bound for New York, the plaintiff brought this action on the case, which came to trial upon the defendant's plea of not guilty, and the plaintiff had a verdict for $10,000 damages.

The plaintiff gave evidence tending to prove that when he came upon the after deck of the steamer by the usual place for entrance, there were a number of soldiers in the service of the United States on that deck; that some of them were armed with muskets loaded and capped; that some of them were "crazy drunk;" that they were noisy and quarrelsome, using profane and indecent language, and pushing each other and the passengers about the deck; that one of them with arms, in particular, struck the hat of a civilian passenger down over his eyes, by a severe blow given without provocation; that said soldiers remained upon the said after deck in substantially the same condition for about half an hour; and that finally in a struggle between some of them, one of the said muskets was thrown down upon the deck and discharged, and the ball passed through the plaintiff's foot producing a very severe injury.

The defendants gave evidence tending to prove that, in pursuance of general orders from the United States Adjutant General's Office, at Washington, and an order made by the officer in command at Fort Trumbull, requiring that recruits and men fit for duty belonging to the 14th regiment of infantry, army of the United States, rationed and equipped for field duty, should leave the post of New London that evening to join their regiment in the field, and requiring the quarter-master of the post to furnish the necessary transportation, a detachment of the said 14th infantry, consisting of sixty-three enlisted men, among whom were a sergeant and two corporals, accompanied by two lieutenants in said regiment, left the said fort under the command of said officers, and with their regimental band, marched on board the defendant's said boat and were stationed on the forward deck by their officers, at about half past nine o'clock in the evening of that day; that eighteen of said men were detailed by their officers as a guard; that said guard were armed with muskets loaded and capped, and furnished with bayonets, and the remainder of the said detachment were unarmed; that sentinels were also selected from the said guard and stationed, to confine the detachment to the forward deck and to prevent their going on shore. (p. 8.)

That soon after the said passengers from the said railroad came on board, one of the unarmed recruits from Fort Trumbull attempt-

ed to pass the sentinel on the port side of the engine room and was repulsed; that he repeated the attempt and again failed; that he finally returned with several of his comrades and overpowered the sentinel; they then rushed aft near to the place where the passengers came on board, several of the said guard followed, when a struggle ensued near the saloon stairs between the insubordinate recruits and the pursuing guards, and in the struggle to arrest these men, a musket was snatched by one of them from the hands of one of the guard, and was thrown violently upon the deck and discharged, by which the plaintiff was shot. (p. 8.)

For the purpose of proving the condition of affairs on said deck, the extent and character of the disturbance, the condition and situation of the officers and soldiers on board, and the manner in which they discharged their duty prior to and at the time when the plaintiff received his injury, and as evidence of the length of time between the beginning of the disturbance and the firing of the shot, and for the purpose of showing a failure on the part of the officers of the said soldiers to keep them in proper order and repress disorder amongst them, (it being admitted that there were no persons on board directly charged with the care of preserving order and repressing disorder among said soldiers other than their officers,) the plaintiff offered in evidence the testimony of George Renton, John L. Sullivan and Helen his wife, who were passengers on said boat, who testified; That after they had gone down to the dining saloon and were at the table, a man in military uniform whom they supposed to be a sergeant, came into the saloon and saluted an officer in uniform whom they supposed to be a lieutenant, and who was sitting at the table with another officer whom, from his uniform, they supposed to belong to the navy, and said to him, "There is a row on deck and I cannot suppress it;" that the officer who was addressed, replied, "Mind your orders;" that the person supposed to be a sergeant said, "I am afraid some one will be hurt;" that the officer replied, "You have your orders, mind your orders;" that the person supposed to be a sergeant then retired, and that after a few minutes he came down

again into the saloon very hurriedly, and very soon after the report of a gun had been heard by one of the witnesses, and addressing the same officer, said, "For God's sake come up; a man has been shot." (pp. 8, 9.) "To the admission of this evidence for all the purposes for which it was offered, the defendants objected, and particularly for the purpose of showing the condition of affairs upon the deck of said boat just prior to and at the time the plaintiff received his injury." But the Court overruled the objection, and admitted the evidence. The defendants duly excepted. (p. 9.)

The question at issue upon the declaration and plea was, whether there was any neglect of duty on the part of the defendants towards the plaintiff as a passenger on their steamer, under the circumstances in which they were placed.

The circumstances were peculiar, and are detailed in the bill of exceptions so far as considered necessary to enable the court to determine the admissibility of the evidence excepted to.

Several purposes are stated for which this evidence was offered.

To the admission of the evidence for all of these various purposes the defendants objected, and particularly for the purpose of showing the condition of affairs upon the deck of said boat just prior to and at the time the plaintiff received his injury, that being the prominent object for which it was offered, and the one upon which its admission would be most calculated to have an improper influence with the jury.

POINTS.

I.

If the evidence was inadmissible for either of the purposes for which it was offered, its admission for all the purposes mentioned was erroneous, provided the exception was properly taken to its admission for such purpose.

II.

The exceptions were well taken to raise the question of its admissibility for each separate purpose.

An attempt was made on the argument of the motion for a new trial to show that the exceptions, however well taken at the trial, were not so stated in the exceptions.

It must be obvious that it was intended to be stated as a distinct exception to each, and was so treated by the Circuit Court, the judge who settled and allowed the bill of exceptions being upon the bench.

III.

The evidence was inadmissible for the purpose of proving the state of affairs on deck prior to and at the time the plaintiff received his injury.

1. As evidence of the truth of the words spoken, it was mere hearsay.

2. It was not spoken in the presence and hearing of any officer of the boat. It was *res inter alios acta.*

3. It was not addressed to any agent or officer of the defendants.

4. It was no part of the *res gestæ.*

Starkie

5. The declarations were not admissible as part of the transaction. What is the transaction but a description of the person who said the words, and the person to whom they were addressed? The transaction in and of itself was nothing. The great danger would be that if these declarations were allowed to go to the jury, and counsel were allowed to comment upon them as evidence of the condition of affairs on deck, the jury would regard it the same as the sworn evidence of an eye-witness.

In the conflicting claims of the parties as to the true character of the disturbance among the soldiers, those declarations might have a controlling influence on the mind of the jury, and the issue be thus found upon testimony not under oath, and from witnesses whom the defendants had no opportunity to cross-examine.

IV.

The defendants regard the exceptions to this evidence as substantial in their character, and not merely technical, and respectfully submit that the judgment in said cause should be reversed, a *venire de novo* be awarded.

J. HALSEY,
Counsel for Plaintiffs in Error.

SUPREME COURT

OF

THE UNITED STATES.

NORWICH & NEW YORK TRANSPORTATION COMPANY,

IN ERROR,

vs.

JOHN FLINT.

BRIEF FOR DEFENDANT IN ERROR.

I. A party must point out, at the trial, the particular objection.

Reasons for this:

(1.) The judge is not obliged to seek for reasons, at the peril of a mistrial. If evidence is admissible for any purpose, and the objection is general, he admits it. If it is liable to be misapplied, the judge will guard against this by his subsequent instructions.

(2.) The party offering the evidence may withdraw it altogether, or may take care that its application is limited to the point or points to which it is legally applicable, by instructions.

(3.) If the objection is general, and the evidence is admissible for any purpose, and is admitted generally, no harm need be done; for if the objector wishes it limited to specific purposes, he can so require at the charge. For the objector neither to specify his objection when the evidence is offered, nor ask for the restriction, and then complain, by writ of error, that it may have been applied to a point to which it was legally inapplicable, would be grossly unjust to the other side, and contrary to justice and public policy.

Rules of Supreme Court, No. 4.
United States v. McMasters, 4 Wallace, 682.

Rogers v. The Marshal, 1 Wallace, 644.
Camden v. Doremus, 3 How. 515, 530.
Moore v. Bank of Metropolis, 13 Pet. 310.
Eliot v. Peirsol, 1 Pet. 338.
Waters v. Gilbert, 2 Cush. 27.

II. If a piece of evidence is admissible for certain purposes and with certain limitations, and general exceptions are taken to its admission, the court will presume that the necessary instructions were given to the jury, unless special exception is made to the refusal or neglect to give such instructions.

Commonwealth v. Kneeland, 20 Pick. 211.

III. No doubt the transaction in the saloon was admissible for some purpose.

(1.) It tended to show that the two persons described *were* officers of this detachment.

The description of the uniform they wore, the military salutes, the mode of addressing each other, and the *verbal acts* which passed between them, were all facts tending to show that they were officers of the army; that they were charged with actual duties on board this boat at the time of the transaction; that one was a commissioned officer and the other his subordinate and a sergeant. The identification of the officers was for the jury. The weight of the evidence is not open on the writ of error.

(2.) There thus being evidence to show that these two were officers engaged in the performance, after some fashion, of duties to this detachment, and there being other evidence to show how many officers accompanied this detachment (Record, p. 24), the evidence objected to tended to show these two officers were absent from the scene of contest, and how long they were absent, and at what period of the disturbance.

This was material to the issue. The real question between the parties was whether the defendants were negligent in not doing more than they did to protect the passengers. Whether they were negligent depended upon a comparison between the protection needed

and the protection afforded. The amount and character of the protection needed depended upon the conduct and condition of the detachment and the state of things on deck as known, or as it ought to have been known, to the defendants. To solve this question, the jury had a right to know what and how many officers accompanied the detachment and were with the soldiers at the time of the outbreak and during its continuance.

(3.) It tended to show how long the disturbance lasted. Its duration was a material inquiry, as bearing upon the negligence of the defendants. In all questions of duration, especially when there is excitement, no direct evidence of the lapse if time ascertained by a watch, can be expected. It must be inferred from a comparison of a variety of circumstances. These circumstances are better than mere estimates or opinions. The evidence objected to tended to show that supper was going on in the saloon and had far advanced when the sergeant came in, the length of time he was there, the length of time he was absent on deck until his return to the saloon, and the point in these stages of duration at which the shot was fired. It also tended to show that the disturbance must have begun before the sergeant's first appearance, and was continuing when he re-appeared.

(4.) It tended to show the nature and extent of the disturbance and insubordination on deck. In this view the words that passed between the sergeant and lieutenant were not offered as narrative of a past event to prove the truth of any thing stated by either.

The words uttered, as such, might be omitted if it were possible. The appearance of the sergeant in this place, at this time, his looks, manner, tone of voice, excitement and urgency, were evidence of the nature of the occurrence which produced these phenomena. If these phenomena are accompanied by words uttered under the immediate influence of what had occurred, the words cannot be separated from the acts. They are in fact verbal acts. If any of these words have the character of an opinion or mere narrative as well as of verbal acts, — as, for instance, "There is a row on deck and I cannot suppress it. I am afraid some one will be hurt," — the court will presume that the presiding judge instructed the jury, if necessary, that they must not take these bare statements as proof that the row was one

which the sergeant could not suppress, and which he thought dangerous. The record does not show that such instructions were not given, or were asked for by the plaintiff in error.

(5.) The evidence tended directly to show neglect on the part of the plaintiffs in error.

The general evidence showed that the captain of the boat left the whole responsibility for the conduct of the soldiers, the repression of this tumult, and the protection of the passengers against the soldiers during the tumult, entirely to the military officers. It was a part of their case that the detachment was sufficiently officered, and that they discharged their whole duty to their passengers by leaving the soldiers to their own officers. Certainly in such a case, under the contract between carriers and passengers, the carriers took the risk of the military officers being competent and actually performing their duty reasonably. This evidence tended to show that one of the two commissioned officers entirely neglected his duty, and yet was an officer relied upon for authority and assistance. If the carrier threw the duty of protecting the passengers on the lieutenant, and the lieutenant after notice threw it on the sergeant, and the sergeant was absent during a critical period, and the whole resulted in the passengers not being adequately protected, the whole shows negligence of the plaintiffs in error.

(6.) The evidence of the witnesses in the saloon may be presumed to present all they saw or heard respecting the connection of this officer with the affairs on deck, and therefore tends to show that his aid was not invoked by the captain or officers of the boat.

(7.) The evidence tends to fix the time when the shot was fired, and to show the connection of that event with the absence of the officers from the deck.

All these considerations show:

First, That there were many purposes for which this evidence was competent, if that is not sufficient, under the circumstances.

Second, That it was competent for every purpose for which it was stated to have been offered.

1 Stark. Evid., 47.

1 Greenleaf Evid., § 108 et seq.
Haines v. Rutter, 24 Pick. 245.
Goodhue v. Hitchcock, 8 Met. 62.
Lund v. Tyngsboro', 9 Cush. 36.
Enos v. Tuttle, 3 Conn. 27, 247.
Phelps v. Foote, 1 Conn. 387.

R. H. DANA, JR.,
for Defendant in error.

The defendant in error subjoins the opinion of the Judges of the Circuit Court, as part of his argument.

OPINION OF THE JUDGES OF THE CIRCUIT COURT.

WOODRUFF, J. It was conceded, on the argument of this motion, by the counsel for the defendants, that the general question, whether a common carrier of passengers is liable for an injury received by one passenger through the negligence or from the misconduct of a fellow passenger, is not raised by this motion or involved therein. Nor does the case now before us disclose upon what grounds, either of law or fact, the verdict for the plaintiff in this case was rendered. It must, however, have necessarily proceeded upon some neglect of duty or violation of obligation to employ the utmost care and diligence that the plaintiff might be carried safely to his destination.

Against what possible injuries the defendants were bound to adopt precaution; what dangers they were bound to foresee and guard against in advance; whether, in these days, in which the means of carriage are customarily furnished on a large scale and are used by many hundreds together, owners of steamboats and proprietors of railroad lines are under obligations to have at command a force adequate to the protection of passengers against possible assaults and injury from other passengers, and, therefore, should be prepared in advance to furnish such protection, even against the just presumption that their passengers will be orderly, keep the peace, and do each other no harm; and, especially, whether the presence of a detachment of soldiers received as passengers, under the ordinary command of proper officers, ought to have suggested to the defendants that

there was any danger whatsoever that other passengers would be injured, and so required them to provide special defence or protection to such other passengers — are, it may be, questions of interest to carriers of passengers. It would seem that, in respect to such a detachment, the presumption of obedience and subordination should obtain, and that a common carrier would not be bound to anticipate the contrary. On the other hand, if a carrier has already received a company of soldiers, or a party, whether soldiers or not, whom he finds to be "crazy drunk," (to use the language of the case before us,) and who become riotous and disorderly, so as to menace danger to other passengers to thereafter arrive for carriage, a different question arises. The case, as made for the purposes of the motion, is not very distinct upon that point; but if, before the train on which the plaintiff and other passengers arrived, such a condition of the soldiers had already become manifest, the duty of the defendants to adopt such precautions as were in their power to restrain them, for the protection of the plaintiff and such other passengers, would seem obvious. And if, after their arrival on board, disorder and violence arose among the soldiers or among any passengers, it is no harsh rule that holds it to have been the carrier's duty to use such means as he had, or, by ordinary care, might have had, for the protection of the peaceable. The evidence which was objected to and was received, was, if pertinent at all, applicable to this view of the duty of the defendants. The rule of liability prescribed by the Court is not stated in the case before us, but, as it was not excepted to, it must be assumed, for all the purposes of this motion, to be the correct rule; and I have made the foregoing suggestions for the sole purpose of seeing whether, under any rule of liability, the evidence so given was competent in its nature and relevant to the question.

Assuming that the defendants, when the disorderly conduct of these soldiers began, became bound to employ their means diligently for the protection of other passengers, the question for the jury was, did they do so? and, if not, did their negligence in this cause the injury to the plaintiff of which he complained? It was pertinent to this question to inquire how many riotous persons there were, how long the disturbance continued, and to what extent it was carried, and, as especially bearing on the question of due diligence, how far the officers of the soldiers, whose plain duty it was to use every means which even military law would warrant to preserve order, were in the actual discharge of that duty; for, under any view of their own duty to be diligent, the defendants had a right to rely upon and take the aid of such officers, and, until it appeared that such aid was withheld or

inefficiently furnished, a jury might well conclude that the defendants were themselves excused from any interference. In this view, then, was the evidence in question competent and relevant?

The objection on the trial was not to any parts of the testimony of the witnesses, but to the whole; and it would not now be just to the plaintiff, or conformable to the rule of law governing the subject, to permit the defendants to divide the testimony into parts or sentences, and argue as to one or more, that it or they are not competent. If, on the trial, the defendants had objected to a part or portion of the testimony, the plaintiff might have waived it. If it were claimed that the words of the sergeant addressed to the officer in the cabin were not competent evidence, as against the defendants, of the fact which he stated, still, if the testimony apart from these words was admissible, the objection must fail. In short, if the whole testimony, as an aggregate, was admissible for the purposes for which it was offered, then it was properly received, although specific parts of it might have been pointed out which it would have been the duty of the Court to exclude. Counsel should make their objections in such case specific, so that the adverse party may have an opportunity to waive what is objectionable, and so that the Court may have its attention called specifically to the precise point which counsel propose to urge, in any stage of the cause, to the testimony offered.

Another preliminary observation should be made, in view of the arguments presented on the motion. The objection which was made is itself of a somewhat equivocal meaning. The defendants objected to the admission of the evidence for all the purposes for which it was offered. This, it is argued by the plaintiff, means simply a general objection to the evidence for the purposes for which it was offered, and is not a specific objection that the evidence is not admissible for any of the purposes for which it was offered, and, hence, that if the evidence was admissible for any one of the purposes for which it was offered, (other than to prove the condition of affairs on deck, which was particularized,) the objection was not well taken and should be overruled. Although the form in which the objection is stated is somewhat equivocal, I am inclined to think its import, as intended and understood, was particular and not general. The plaintiff had stated several purposes for which he offered the testimony, and, when the defendants said they objected to its admission for *all* the purposes for which it was offered, they meant for each or any of these purposes, and they added their particular specification of the purpose to show the condition of affairs on deck, because they laid special stress upon that point. I admit that the

language is not the best chosen to convey the idea, but, on a motion for a new trial, a rigid technical criticism ought not to have much weight, if the Court are satisfied that there was error operating to the prejudice of the party objecting.

I shall deal with the objection, therefore, as if it were made distinctly and consecutively, to the admission of the testimony for each of the purposes specified by the plaintiff, as each purpose was separately announced.

Reverting to the questions in issue, it was material, or certainly relevant, to show the character of the disturbance on deck, whether formidable or slight, to show its duration, and whether any and what efforts were made to repress it, or to protect passengers from injury therefrom, and, as connected with this last, whether the officers of the detachment were using their power and means for the purpose. Indeed, it was not denied, on the argument of this motion, that these were relevant and proper subjects of inquiry; and these are the precise purposes for which the testimony was received. If, then, the testimony bore on these matters, and was, in its nature, competent, the objection was properly overruled.

1. There was evidence that a detachment of soldiers, in command of two lieutenants, a sergeant and two corporals, were on the boat, and that a conflict between some of the men and others who had been selected as a guard, was in progress; and that it began shortly after the other passengers came on board. At a time plainly concurrent with the disturbance, a person in uniform, with stripes on his arm, descends from the very place of the disturbance, near the saloon stairs, into the saloon, and, with the form of military etiquette, salutes a man in military uniform, which, in the judgment of the witnesses, was that of a lieutenant; the latter replies to him in manner and terms of military authority, and the former yields obedience, but again returns and invokes the aid of the other. Now, all this is not conclusive evidence that these were officers of the disorderly soldiers; but the uniforms, and the evident relation between them, testified by acts as well as words, were circumstances which were proper to be submitted to a jury on that question of identity. If a witness had been produced, and had testified that he saw a person, in the uniform of an officer, give orders to the detachment, which they obeyed, it would not be conclusive evidence that such person was an officer, or that he had, in fact, any authority; but it would tend to show both. Transactions which, in all probability, would not take place unless certain other facts existed, are evidence oftentimes from which such other facts may be inferred; and the affairs of life are to be judged of according to their usual and natural signification.

When, therefore, proof has been given that a detachment of soldiers and their officers are on board the steamer, and persons are pointed out, in the uniform of officers, acting toward each other as such, and, in reference to the soldiers, giving and obeying commands, although not in the very presence of the soldiers, there is, certainly, a presumption that they are the officers, because it would be unnatural, and against the ordinary course of human experience, to think otherwise. Although the witnesses had no actual knowledge other than what they witnessed, the transaction would, certainly, aid the jury in determining whether they were officers of the detachment, because, in the absence of counter evidence or explanation, it was grossly improbable that they were not. I have no hesitation in saying that, upon the question of the identity of the officers, and their connection with the detachment of soldiers, the testimony was proper for the consideration of the jury. It follows, that it bore distinctly on the question — where were such officers, and were they doing any thing, and what, for the preservation of order, the repression of the violence, and the protection of peaceable passengers?

2. It was of some materiality, under the rule of duty resting on the defendants, above stated, to show how long the disturbance continued before the plaintiff was injured, because, in view of the other evidence as to the number of men engaged therein, the jury were to consider whether the defendants made suitable endeavors, by the means then in their power, to suppress it. If the acts of the supposed sergeant and lieutenant were any evidence of the condition of things on deck, then, clearly, his coming and departure, and the subsequent report of the gun, were evidence, slight, I admit, and of very little importance, but yet evidence, that the duration was somewhat greater than the time thus consumed in these acts of the sergeant, at least, that it began before he came down, and continued during his interview and afterwards, until the report of the gun was heard.

3. Did the transaction legitimately tend to show the condition of things on the deck? Clearly, in the view above taken, it tended to show that the soldiers were left without the care of the lieutenant. For, if the jury should be satisfied that the supposed sergeant and lieutenant were officers of this detachment, then they necessarily must find, first, that such lieutenant was doing nothing personally for the promotion of order, and that temporarily, at least, the men were left without the presence of either him or the sergeant; and this to some extent appertained to the condition of affairs on deck.

But, more than this, the entire transaction was of significant import

touching the extent and character of the disturbance there; for, there was other proof of the fact of disturbance and that it was caused by the soldiers. Pending the disturbance, their chief non-commissioned officer comes to his superior officer, expresses his inability to deal successfully with it, and invokes his aid in suppressing it. It is refused, and he returns, and soon after hurries in evident excitement down the stairs and implores assistance in terms of despair. It seems scarcely possible to doubt the significance of these acts, or their relevancy, if competent. An illustration alike in kind and only differing in that its competency and relevancy may be more strikingly obvious, may be suggested. A company of disorderly persons enter a house and begin a disturbance, and women and children come rushing from the house in evident fright and screaming for aid. This would be evidence that what was enacted within was of a character and extent calculated to create alarm and awaken apprehension of danger. It would not, perhaps, be proof of particular acts, and, possibly, their declarations might not be used to fix guilt upon particular individuals, but, of the general fact that the disturbance, the existence of which was otherwise proved, was of such proportions or extent as to excite and alarm, and so to call for interference to stay or suppress it, it would clearly be competent evidence.

4. It is strongly urged that the declarations of the sergeant to his superior are not evidence as against the defendants, and should not be received. I have already observed that the declarations were not objected to as such. The objection was general, to all the testimony. But I do not think it necessary to dispose of that objection by any technical answer. In my judgment, the declarations were admissible, as indicating, first, the relation of the sergeant to his officer — not as a mere declaration, but as an act of subordination; second, as showing the alarm and fright of the sergeant and a state of mind indicating need of assistance; and, finally, the whole transaction was a part of the *res gestæ*, in such sense that the jury might properly be permitted to hear it. His declarations were not, upon their own isolated and separate credit, to be received as evidence of the facts he stated, but the facts to be inferred do obtain credit from the circumstance that, in the situation in which he was placed, in the fright and alarm under which he spoke, and in the condition of things on deck already proved, he did make such utterances to his superior officer. Declarations, when part of the *res gestæ*, bear the character and have oftentimes the force of acts, and, still oftener, are used as proper evidence, giving character and explanation to other acts. Mr. Starkie says, with singular pertinency to the declarations now in question: "If the declaration has no tendency to illustrate the

question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person making the declaration, it is not admissible; but, if any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker, then the declaration is admissible." This describes the testimony in question. The connection of the whole with the circumstances of the case, gives it credit and significance, not as the isolated act or statement of the sergeant, but as a narrative of occurrences in their connection with the principal events, receiving significance and inviting belief. Confining myself to the single question presented on this motion, I am constrained to say that the motion for a new trial must be denied.

Judge SHIPMAN concurred.